Remarks by Commissioner Curt Hébert
on the
Rescission of the Hydroelectric License
for the Enloe Dam Project

Given the unfortunate circumstances presented, I believe that the best approach is to rescind the license previously issued to the Public Utility District No. 1 of Okanogan County, Washington. The alternative would be to issue a license that, because of the insistence of a single federal resource agency, would include a condition requiring construction of fish passage facilities. Even without the obligation to install and operate an upstream fish ladder, the project would cost about $700,000 more than the current cost of alternative resources. As today's order explains, slip op. at 15, "[t]he obligation to construct and operate a fish ladder would significantly increase the costs of a project that already appears to be uneconomical." [1]

Moreover, issuance of a license order with the recommended fish passage condition would be deeply offensive to a number of governmental and tribal authorities. In particular, Canadian authorities remain adamantly opposed to the installation of fish passage facilities at Enloe Dam that would introduce anadromous fish into Canadian waters. And the various bands of the Okanogan Tribal Nation oppose fish passage at Enloe Dam, based on concerns of negative impacts to fish stocks and on tribal legend.

The Commission was mindful of these concerns when it issued its earlier orders in this proceeding. To its credit, the Commission resisted the efforts of a single agency – the National Marine Fisheries Service of the U.S. Department of Commerce – to attach a mandatory condition to the license requiring the construction and operation of upstream facilities. At that time, the Commission believed that it had some discretion not to adopt the proposed condition. The Commission's preference was to encourage the District and all applicable agencies to reach a regional, cooperative solution to the identified upstream fish passage problem. Among other things, the Commission's hope was that the parties could reach agreement on allocating the costs of compliance with a fish passage condition if acceptable to the District.

Unfortunately, the Commission's hope that this protracted dispute could result in a mutually-acceptable agreement has been undermined by the recalcitrance of a single

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[1] A more precise quantification of the costs to the licensee of satisfying a mandatory fish ladder condition would depend upon whether all of the costs of the condition would be incurred by the licensee and, of course, the specific design of the facility. My understanding is that the annual cost of the licensed project -- even without the obligation to install and operate an expensive upstream ladder-type facility – would be more than double the annual benefits from the project.

agency. NMFS now clarifies that it is advancing the fish passage condition pursuant to its authority under the Endangered Species Act to minimize the impact of the Enloe Dam project (an "incidental taking" under the parlance of the ESA) on protected steelhead trout. In today's order, the Commission states that it no longer has the discretion to continue to resist NMFS' overtures. I reluctantly must agree with the Commission's legal analysis.

I continue only to comment briefly on the role of NMFS in upsetting the efforts of all of the other parties to resolve this matter in a cooperative and non-mandatory manner. The fishway concerns articulated by NMFS are not new. Today's order, see slip op. at 2-3, spells out in considerable detail the historical efforts of numerous parties to minimize the role of Enloe Dam in blocking fish passage. Among other things, the District consulted with pertinent agencies and Indian tribes, conducted studies to support minimum flow and other mitigation requirements, and redesigned project features to address the fish passage problem. The Northwest Power Planning Council, authorized by Congress to protect, mitigate and enhance fish and wildlife resources affected by hydroelectric projects in the Columbia River Basin, was satisfied with the District's efforts to address fish passage issues. Moreover, the Northwest Council, the Bonneville Power Association, and the Bureau of Reclamation were no longer advocating or suggesting removal of Enloe Dam as a means of providing upstream passage.

Left for resolution was the issue of allocating financial responsibility for the construction and operation of any future upstream fish passage facilities at the project. The Commission previously expressed its expectation that resource agencies would refrain from imposing additional conditions until all of the parties could reach a collaborative, regional solution to the upstream fish passage problem.

NMFS, unfortunately, decided not to work to advance a collaborative, regional solution. Instead, armed with authority under the ESA that, for all essential purposes, requires the Commission to impose, and the licensee to accept, the fish passage remedy it favors, NMFS has insisted on a license article requiring the construction and operation of a fish ladder. It need not concern itself with the interests of different entities with different perspectives on the licensing process.

This is, of course, a problem with the hydroelectric licensing process that is not specific to this case or these particular parties. As this case demonstrates, the Commission can urge parties, in the strongest possible language available, to resolve their disputes in a cooperative manner. And as another case on today's hydroelectric agenda demonstrates, the various participants to a hydroelectric proceeding can significantly speed up the process, and minimize the extent of the Commission's involvement, by reaching agreement on disputed issues. See Avista Corporation, 90 FERC ¶ ___ (2000) (relicensing of Clark Fork Project).

But one party, carrying mandatory conditioning authority, and focusing myopically on its own particular interest, can upset the collaborative process if so inclined. To a party opposing licensing, stalemate may mean victory for one party and defeat to the rest of America.

I view this process, where some participants, bearing veto power, have more negotiating authority than others, if indeed inclined to negotiate at all, as absurd. As a result, I am encouraged by pending legislative efforts to rationalize this process, by requiring a greater level of cooperation among federal and state resource agencies. Such reform would benefit consumers by forcing all parties to the table in an effort to resolve such disputes in a fashion that is best suited for the benefit of all Americans. The ESA should be used as a workman's tool, not a sniper's rifle.